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95-1706

Supreme Court, U.S.
FILED
JAN 24 1996
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

RAYMOND SEVER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ADDENDUM TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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(3pp)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 95-7019 and 95-7112

UNITED STATES OF AMERICA

v.

RAYMOND SEVER,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 94-cr-00060)
District Judge: Edwin M. Kosik

Submitted Pursuant to Third Circuit LAR 34.1(a)
October 23, 1995

Before: SLOVITER, Chief Judge, COWEN and GARTH, Circuit Judges

(Opinion filed OCT 18 1995)

MEMORANDUM OPINION OF THE COURT

SLOVITER, Chief Judge.

This is a direct appeal by the defendant Raymond Sever who was convicted following a jury trial, of threatening to assault two postal officials in violation of 28 U.S.C. § 115(a)(1). The facts do not seem to be in significant dispute. Sever, who had been employed by the Postal Service for 14 years, served as a window clerk at the Honesdale, Pennsylvania Post Office. Sever was unhappy with the change in procedure directed in March, 1994 for handling registered mail because he believed it would not be as secure, and he failed to comply with instructions to send out the registered mail every day. Instead, on two occasions Sever locked the registered mail in the safe when went home. He persisted despite directions to comply with the new procedure and, thereafter, on March 14, 1994, Sever was issued an official letter of warning signed by Edwin DeGroat, his supervisor, which was handed to him in private by Robert Spaulding, his immediate supervisor. Sever, refused to initial the letter, and became angry when Spaulding asked another employee to initial to show Sever's receipt. Sever then asked to discuss the matter with Spaulding in private, but was apparently dissatisfied with this discussion. He approached another employee, showed him the letter, and told him that if he were disciplined, he would, "buy a gun, come back, and he had a few people in mind he would take care of." App. at 94. He also stated that "nobody in this office has seen me go off, but I will go off." App. at 94. Rollison told Spaulding of this conversation the next day. App. at 95.

At 8:30 a.m. the following day, March 15, 1994, Spaulding met Sever, who, looking very angry, stood approximately six feet away from Spaulding, pointed his finger at him like a gun, and made the sound of a discharging firearm ("pow-pow"). In response to this, Spaulding told a nearby employee that maybe he had "better get a flak jacket." App. at 42. A few moments later, Spaulding again met Sever, who again, looking very angry, pointed his finger at Spaulding and made the sound of a discharging firearm. App. at 43.

Shortly after 9:00 a.m. that same morning, while Spaulding and DeGroat were working in an office, Sever, approached the doorway of the office, pointed his finger at the two men, and again made the sound of a discharging firearm. App. at. 44, 81, 87. At approximately 9:30 a.m. Sever, looking serious, again pointed his finger at DeGroat and made the sound of a discharging firearm. App. at 44; 67. After this, the fourth such incident, DeGroat consulted higher management and suspended Sever. App. at 68-69. Before he left, however, Sever told DeGroat that "this is the first time in my life that I felt like I could hurt someone." App. at 69.

Sever raises four issues on appeal. He contends first that the district court's instructions to the jury were incomplete and erroneous regarding the proper analysis of the elements of 18 U.S.C. § 115 in that the court failed to instruct the jury that it needed to subjectively analyze the evidence to determine whether Sever threatened with specific intent to impede, intimidate or retaliate against Spaulding or DeGroat. Significantly, Sever did not object to the jury instructions, even though the court invited counsel to submit objections. As the Supreme Court has stated, "It us the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." Henderson v. Kibbe, 431 U.S. 145 (1977). Accordingly, we will review the jury instructions only for plain error. See United States v. Zehrbach, 47 F.3d 1252, 1260 & n.6 (3d.Cir) (en banc) (citations omitted), cert. denied, 115 S.Ct. 1699 (1995); Government of the Virgin Islands v. Knight, 989 F.2d 619 (3d.Cir. 1993), cert. denied, 114 S.Ct. 556 (1993); See also Fed.R. Crim. P. 52(b). In doing so, we must look at the instructions not "in artificial isolation, but . . . in the context of the overall charge." United States v. Price, 13 F.3d 71, 724 (3d.Cir. 1994) (quoting United States v. Park, 421 U.S. 68 (1975) (quoting Cupp v. Naughton, 414 U.S. 141 (1973), cert. denied, 114 S.Ct. 1863 (1994).

The language of the jury charge is left to the discretion of the district court and will be upheld if it fairly and adequately submits the issues in the case to the jury and does

not confuse or mislead jurors. United States v. Simon, 995 F.2d 1236, 1243 n.11 (3d.Cir. 1993). An error will be reviewed as affecting substantial rights if it was prejudicial, i.e. "affected the outcome of the District Court proceedings." United States v. Olano, 113 S.Ct. 1770, 1777-78 (1993). The defendant bears the burden of persuasion with respect to prejudice. Id. at 1778.

Here, the crime with which Sever was charged was threatening to assault a United States official "with intent to impede, intimidate, or interfere with such official . . . while engaged in the performance of official duties, or with intent to retaliate against such official . . . on account of the performance of official duties . . . ." 18 U.S.C. § 115(a)(1)(1995). The district court instructed the jury, in relevant part, as follows:

> Now, in order to sustain its burden of proof for the crime of threatening to assault[,] the government must prove each of the following essential elements beyond a reasonable doubt. One, that the defendant threatened to assault. Two, a federal employee of the postal service. Three, with the intent to impede, intimidate, interfere with or retaliate. And, four, while the officer or officials were engaged in or on account of the performance of their official duties.
>
> Ladies and Gentlemen, an assault is a threat to do injury to the person of another when coupled with the apparent present ability to do so, to put the person against whom the assault is directed in fear of immediate bodily harm. A threat is an expression of an intention to inflict injury or damage to another.
>
> In determining whether the defendant's statement may be considered to be a threat, the only intent requirement is that the defendant intentionally or knowingly communicated his threat, not that he intended or was able to carry out the threat.
>
> In other words, proof of intent to injure is not required, neither is the actual harm or physical contact

with the victim. It's sufficient if the defendant intentionally communicated his threat and put the victims in fear of being assaulted or intimidated.

Now, whether, a particular action or statements may properly be considered a threat is governed by an objective standard, whether a reasonable person would foresee that the statement would be interpreted as a serious expression of a threat to inflict injury or damage.

The phrase, "while engaged in the performance of official duties," means activity within the general scope of that official or employee while they were employed in doing what they were expected to do.

App. at 197-98 (emphasis added).

Sever argues that the district court failed to instruct the jury that it needed to determine whether he had formed the specific intent to intimidate, impede or interfere with Spaulding or DeGroat in the performance of their official duties or to retaliate against them and to evaluate the formation of that intent by subjectively examining the facts. Looking at the instructions in the context of the overall charge, we reject this contention.

In response to jury inquiries, the district court twice repeated the elements of the crime charged, emphasizing the government's burden of proving each element beyond a reasonable doubt. App. at 203-04, 205-06. Additionally, in response to a third jury inquiry, the district court repeated the elements of assault. App. at 208. Thus, on three separate occasions the district court instructed the jury that "the government must prove . . . beyond a reasonable doubt . . . that the defendant threatened to assault . . . a federal employee of the postal service . . . with the intent to impede, intimidate, interferewith or retaliate . . . while the official or officials were engaged in or on account of the performance of their official duties." This was an adequate charge on the required intent.

Sever next argues that the prosecutor committed

prosecutorial misconduct in three ways; by referring to past killings of postal employees, displaying an exhibit the district court had previously ruled inadmissible, and giving personal opinion in his closing argument.

During his cross-examination of Sever, the prosecutor asked Sever the following question:

> Pardon the analogy, but it seems to me or the impression I get, when a disgruntled postal employee walks into his employer's or into his superior's office and in the presence of other employees, makes the finger pointing and makes the sound of a gun going off, I draw an association with all those disgruntled postal employees who, having been disciplined or dismissed, go and get a gun and come back, and they start killing people, such as the 15 people murdered in the Postal Service in Oklahoma.

App. at 127-28. Defense counsel objected and the objection was sustained. In earlier testimony, Cynthia Palko, a government witness, was asked why she had become concerned about Sever's gestures, and she stated:

> as postal employees [, we] have on a couple of different occasions received letters from upper management stating that this was a serious thing and no one should be even in a joking manner making remarks or actions concerning any type of violence, because of the previous incidences [sic] around the country in a post office with the mass killings. So, at that point that came into my mind and I realized maybe, you know, after the second time this was a serious situation and should be taken that way.

App. at 88 (emphasis added). There was no objection to this testimony. However, when Sever's counsel objected to the references to the prior incidents in the question posed by the prosecutor during his cross-examination, the court not only

sustained Sever's objection to the question and ordered it stricken, but also instructed the prosecutor not to repeat it. App. at 128. After the completion of his testimony, Sever moved for a mistrial or, in the alternative, a curative jury instruction. App. at 132. Although the district court declined to declare a mistrial, the court stated that it would be happy to instruct the jury again, noting, however, that the curative instruction might do more harm than good. App. at 136.

Sever's counsel subsequently requested , App. at 161-62, and received, App. at 198, an additional curative instruction not to consider the questions previously asked by the prosecutor. At the close of the jury charge, Sever assured the court that he has no "additions or corrections."

In United States v. Pungitore, 910 F.2d 1084, 1128 (3d.Cir. 1990), cert. denied, 500 U.S. 915 (1991), this Court, addressing a similar challenge, stated that "[i]nasmuch as appellants did not object to the curative instruction or request additional instructions, they apparently were satisfied with the district court's response and cannot now complain that comments gave rise to reversible error." This situation is no more susceptible to after-the-fact complaint; if anything, Sever's twice-satisfied request for instruction and express acceptance of the closing charge make for a weaker case. He cannot now, therefore, obtain reversal on this ground.

Sever refers, without elaboration in his brief, to alleged prosecutorial misconduct by the government in showing a poster to the jury in defiance of the trial court's order. He is apparently referring to a poster hung in the post office in Honesdale which was easily observable by all employees and which warned postal employees that no verbal or physical threats would be tolerated in the work place. The prosecutor sought to introduce the poster, together with some correspondence from the postal service headquarters, in connection with the testimony of Spaulding who had been asked whether the issue of violence in the workplace had ever been addressed by the Honesdale post office.
Sever's counsel objected to the introduction of this material on the ground that the documents had just been received by them

that morning, and the court sustained defense's objections but stated that the government was permitted to establish the existence and contents of the documents through the testimony of witnesses. App. at 50. Spaulding then did so, testifying specifically that the poster had been placed on the bulletin board near the time clock in the office.

When Sever denied the existence of such a poster during his testimony, the prosecutor brought the poster and the letters over to Sever for him to identify, and the defense objected on the grounds that the material was not in evidence. In response to the material that had been shown to him, Sever acknowledged having seen the letters but not the poster. Even if, as Sever argues, the jury was able to glimpse the poster from the manner in which it was brought forward to show to Sever, we cannot find from this incident the type of prosecutorial misconduct that would justify a new trial. It is difficult to imagine what prejudice Sever could show inasmuch as the court had ruled that the substance of the poster could be testified to.

Finally, Sever, argues that the prosecutor acted improperly in giving his personal opinion in the closing argument. He alluded in particular to the prosecutor's closing statement that "When I get letters from Washington, D.C., I sit back and wonder if the person who wrote it, what they were smoking. I kick a few trash cans and then I do it, because I'm a person, we're all people under authority, and when we're given a directive we're to follow it whether we like it or not." App. at 166-67. The prosecutor also stated "Congress - I mean, having people worry 'If I do my job, am I going to get hurt or am I going to get killed' is precisely what Congress intended by this statute, to put an end to this. They're very clear about threats in the work place, particularly in a federal workplace, that it cannot be tolerated. It must be dealt with immediately while they're still threats and nothing more." App. at 168.

Sever argues that these statements were a direct appeal to the prejudices of the jury and that even if, as the government argues, the prosecutor was referring to the

testimony of Ms. Palko referring to employee violence, this was more prejudicial than probative and therefore "profoundly affected the rights of . . . Sever to receive a fair evaluation of the evidence."

We do not believe these comments to be the type of personal opinion which the court have held to be improper prosecutorial misconduct. Nonetheless, even if the comments were improper, there is no basis for Sever's claim that they caused prejudice sufficient to require reversal. The government attorney said nothing more than that which is generally accepted by cases, i.e. that the statute was designed to protect persons who would be threatened or harmed because of the performance of their official duties. Accordingly we reject Sever's claim of prosecutorial misconduct. See United States v. Young, 470 U.S. 1 (1985).

Sever also argues that the verdict of the jury was against the weight of the evidence and that this court should sit a "thirteenth juror" and independently evaluated the weight of the evidence. See Tibbs v. Florida, 457 U.S. 31 (1982). Motions for a new trial based on the weight of the evidence, however, are not favored and are to be sparingly granted only in exceptional cases. See Government of the Virgin Islands v. Derricks, 810 F.2d 50, 55 (3d.Cir. 1987)(citing United States v. Martinez, 763 F.2d 1297, 1313 (11th.Cir. 1985)). As noted, there is uncontradicted evidence that demonstrates there was ample basis for the jury to have convicted on the charged offense. While Sever minutely examines and counters each item of evidence, he proffers essentially a jury argument, and the jurors were entitled to draw different conclusions from the testimony they heard.

Finally, Sever argues that he received ineffective assistance from his counsel at trial because counsel failed to advise the court that its jury instruction was incomplete and because he failed to object to the prosecutor's closing argument. Considerable precedent in this circuit makes clear, however, that, as a general rule (with narrow exception not here relevant), this Court will not consider an ineffective assistance of counsel claim on direct appeal. See, e.g. United

States v. Gambino, 788 F.2d 938, 950 (3d.Cir. 1986), cert. denied, 479 U.S. 825 (1986); United States v. Frankenberry, 696 F.2d 239, 242 (3d.Cir 1982), cert denied, 463 U.S. 1210 (1983). We see no reason to depart from that rule in this case.

For the foregoing reasons, we will affirm the judgment of conviction and sentence, but will dismiss without consideration at this time Sever's argument directed to the ineffective assistance of counsel.

TO THE CLERK:

Please file the foregoing opinion.

Chief Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 95-7019 and 95-7112

UNITED STATES OF AMERICA

V.

RAYMOND SEVER,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 94-cr-00060)
District Judge: Edwin M. Kosik

Before: SLOVITER, Chief Judge, COWEN and
GARTH, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and
was submitted pursuant to Third Circuit LAR 34.1(a) on October 23, 1995.

On consideration whereof, it is now here ordered and

adjudged by this Court that the judgment of the District Court entered February 14, 1995 be, and the same is, hereby affirmed, except that claim of ineffective assistance of counsel is dismissed.

Attest:

_____

Clerk
OCT 26 1995